F. M. S.

[ORIGINAL CIVIL JURISDICTION]
HEREFORD, J.
April 20, 1933.

O. R. M. O. M. R. M. MANICKAVASAGAM CHETTY OF TELUK ANSON....Applicant

vs.

THOMAS JAMES McGREGOR OF PENANG.....Respondent

[PERAK ORIGINATING SUMMONS No. 20 of 1933]

Land Code, 1926, Section 134—Agreement between co-owners to subdivide—Caveat over undivided half share in land—Issue of new titles on subdivision—Caveat brought forward to new titles—Application for removal.

An agreement between co-owners to sub-divide land held under Grant and execute cross transfers cannot be held to affect the rights of a person subsequently becoming entitled to a lien under Section 134 of the Land Code over an undivided half share in such Grant. The delivery at the request of the Collector of the original title deed for surrender in exchange for subdivisional titles does not involve a loss of the lien holder's rights. Such rights are carried over against an undivided half share in each new title. The lien holder does not take his lien subject to an equity in regard to the agreement for subdivision if he were not a party thereto and cannot be compelled to remove his Caveat in order to allow the co-owners to execute cross transfers.

Semble:—Should the lien holder remove his Caveat Section 175 would operate to prevent his lodging any further Caveat in respect of the same matter.

J. L. Woods for Applicant.

J. H. B. Will for Respondent.

HEREFORD, J.—This is an application by one of two joint-owners for the removal of a caveat. It appears that the Applicant and one S. L. S. Chettiappa Chettiar (whom I shall refer to as S. L. S.), were joint-owners of Grant 13272 and that in December, 1928, S. L. S. executed a promissory note for $30,000—in favour of the Respondent and as security deposited with the Respondent the Grant 13272 referred to above. On the 7th of December the Respondent lodged a caveat against the undivided half interest of the said S. L. S. in the land comprised in the said grant, thereby under the provisions of Section 134 of the Land Code creating a lien. The debt to the Respondent is still unpaid and the Respondent has taken proceedings to enforce his lien but has not yet proceeded to judgment.

In July, 1928, that is before the deposit of title with the Respondent by S. L. S., it appears that the co-owners of the grant had agreed on partition and in consequence had applied to the Collector of Land Revenue for sub-division of the land in question, and on the 23rd of July, 1931, the Collector of Land Revenue wrote to the Respondent asking him to send the grant to the Land Office to enable the Collector to send a requisition for fresh grants for the sub-divided lots. The Respondent in consequence sent Grant 13272 to the Collector at the same time informing him that a caveat over half interest in the grant had been registered with the Registrar of Titles. On the 6th of November, 1931, the Collector wrote to the Respondent informing him that new Grant No. 10950 for one of the sub-divided lots belonging to S. L. S. had been forwarded to the Collector of Land Revenue, Penang, and requesting him as Caveator to take delivery. In the same letter the collector informed the Respondent that the grant for the other lot "belonging to O. R. M. O. M. R. M. Manickavasagam Chettiar has been issued to the owner." The Collector went on to say "as the caveat lodged by you on the share of Chettiappa Chettiar has also been brought forward to the new title belonging to the co-owner, Manickavasagam Chettiar, the attorney of the co-owner wishes to see you with a view to withdrawing the caveat and making cross-transfers." On the receipt of the title referred to in the above letter the Respondent forwarded it to his Solicitors with a view to proceedings being taken against S. L. S. to enforce his lien.

Subsequently the co-owners appear to have proceeded to execute cross-transfers so that each should be the owner of the land comprised in one of the new titles to the exclusion of the other, the new titles having been prepared in the name of both S. L. S. and the Applicant. On presentation of the transfers for registration the Registrar of Titles refused registration of the transfer to the Applicant by reason of the existence of the said caveat. Correspondence ensued with a view to inducing the Respondent to withdraw his caveat to enable the transfer to be registered. He refused to do so, and the Applicant has taken these proceedings.

Now, it is not disputed that the debt due by S. L. S. has not been paid off and that, in the absence of any circumstances which might operate to deprive the Respondent of the benefit of his lien, he is still entitled to the lien which was created by the caveat in question, and it appears also not to be disputed that even if the Respondent were willing to do so he could not, by reason of section 175 of the Land Code which forbids registration of a second caveat in regard to the same matter, withdraw the present caveat and lodge a fresh one against the land which is intended to become the sole property of S. L. S.; so that in the result if the relief sought for is granted the Respondent will apparently lose his lien absolutely, while if it is not granted the Applicant and S. L. S. will not be able to carry out their agreement for partition unless and until S. L. S. discharges his debt and the caveat is in consequence removed.

It is argued on behalf of the Applicant that the Respondent has in fact lost his lien, at any rate in part on the ground that he has parted with the title for part of the land, and that the correspondence shews that the Respondent had the intention of abandoning his lien in so far as it extended to the undivided half share in the land. There is no definition of lien in the Land

Code, and in *Palaniappa Chetty* v. *Dupire Bros.*, 1 F.M.S. Law Reports 370, it was held that it is necessary to construe the word according to its ordinary legal meaning and the definition given in Halsbury's Laws of England, Volume 19, p. 2, was adopted in that case. That definition is as follows:—

> "Lien in its primary sense is a right in one man to retain that which is in his possession belonging to another man until certain demands of the person in possession are satisfied,"

and Mr. Woods sought to shew from this that if the lien-holder gives up possession his lien is lost, the very existence of the right depending only upon the retention by the lien-holder of that which is in his possession. But, even according to English law, the lien may not be lost where possession is no longer retained, in cases where some intention other than that of giving up the lien, as where the property is delivered to the owner for some particular purpose on an undertaking by the owner that he will return it. In this case it is clear that the Respondent's immediate intention in surrendering the title was to enable the Collector to effect sub-division, and it is not suggested that by that act Respondent deprived himself of his lien. But, it is argued that when he accepted one title for one portion of the land only and apparently acquiesced in the other title for the other portion being delivered to the Applicant, he did intend to abandon his lien in so far as it related to an undivided share of S. L. S. in the land originally held under Grant 13272. In support of this contention Mr. Woods has drawn attention, firstly, to letters written by the Respondent particularly that dated 1st, 8th and 14th September, 1931, in all of which the Respondent refers to "the new grant which is the half interest in the old Grant 13272 in the name of S. L. S. Chettiappa Chettiar: secondly, to the fact that when he received the new title, which is Certificate of Title 10950, and was informed that the title of the other lot had been issued to the Applicant, he made no protest to the Collector although the new title was on the face of it in the names of both the co-owners S. L. S. and the Applicant and was for one half only of the land originally held under Grant 13272: and, thirdly, to the fact that he has never even up to the present time taken any steps to obtain possession of the title which was given to the Applicant, or to put right in any other way the error which the Respondent now claims has been made: and he asks the Court to infer from this that, at any rate by that time, the Respondent had agreed to partition and did intend to abandon his lien in so far as it extended to the undivided half share of S. L. S. and it was only after it was discovered that this could not be effected without the Respondent being in danger of losing his lien in its entirety that the Respondent took up the attitude that he had no such intention.

In my opinion this contention is not borne out by the facts. The Respondent has given evidence and has stated that he is not conversant with land practice in any form, and in my opinion he had no conception of the meaning of an undivided share or that for the purposes of his lien there was any difference whether the land was partitioned or not. I do not think that in accepting the new title sent to him by the Collector and in allowing the other title to be delivered to the Applicant, he ever appreciated the consequences of his conduct, and in my opinion it would therefore be improper to conclude from these letters that he ever had the intention which the Applicant seeks to impute to him. Nor do I think that the fact that he lost the physical possession of the title of part of the land operates to deprive him of his lien over that part regardless of what his intention may have been at the time. The case of *Palaniappa Chetty* v. *Dupire Brothers* referred to above was decided when the Registration of Titles Enactment, No. 13 of 1911, was in force, and section 80 of that Enactment which deals with creation of lien reads as follows:—

> "A lien may be created by deposit of the grant or certificate of title. The holder shall have the power at any time during the existence of his lien to enter a caveat in manner set forth in Part XII hereof to prevent all dealing with the land, and when he has obtained a judgment of the Court for the actual sum due, he shall be entitled to apply for and obtain an immediate order of sale of the land."

According to the provisions of that section a lien may be created by deposit of the grant or certificate of title, and the power to lodge a caveat is only for the purpose of protecting the lien which has been already created; but, by section 134 of the Land Code it is provided that "when a lien is intended to be created over any land the proprietor may deposit his grant, lease of State land, certificate of title or extract from the mukim register, and the person with whom the same has been deposited may present a caveat. Upon registration of such caveat the lien shall be created," so that as the law stands at present a lien is not created by deposit of title as it was before but only upon registration of the caveat, and until registration the deposit of title is ineffective to create any lien over the land. The words "upon registration" appear also in section 96 of the Land Code (which deals with the effect of registration of instruments) where it is provided that no instrument until registered in manner hereinbefore prescribed shall be effectual to render any land liable as security for the payment of money "but upon the registration of any instrument.....the land shall become liable as security in manner and subject to the agreements, conditions and contingencies set forth and specified in such instrument or by this Enactment declared to be implied in instruments of a like nature." To my mind on a true construction of section 134 the test whether a lien is in existence is whether there is a caveat on the land or not. The fact that the lien-holder no longer possesses

the titles or part of them does not destroy the lien, either wholly or in part, as the case may be, although the fact that he no longer possesses them may be strong evidence, and in some cases conclusive evidence, that the lien no longer exists and the caveat ought to be removed. In this case the caveat is still in force and the fact that the Respondent is no longer in physical possession of part of the title for the land over which the lien was created is not, under the circumstances in which the Respondent lost possession of the title, evidence that the lien has ceased to exist. In my opinion therefore the lien created under the provisions of section 134 of the Land Code is not necessarily destroyed when the lien-holder loses possession of the title nor do I think that the circumstances under which that possession was lost prove an intention on the part of the Respondent to abandon his lien. Some stress was laid upon a letter dated 2nd December, 1931, a copy of which marked "SC9" is attached to the Applicant's affidavit of the 17th January, 1933, and it is argued that it is an irresistible inference from that that the Respondent did at that time intend to withdraw his caveat against the undivided interest of S. L. S. and lodge another caveat against the land which was to become the sole property of S. L. S. Mr. Will has explained the circumstances under which this letter was written and I do not think that the inference which I am asked to draw from that letter on behalf of the Applicant is an irresistible one. As I understand the matter the Applicant did suggest to Messrs. Gibb & Co., that the Respondent should take the course indicated. Before consulting their client whether he would agree to this suggestion Messrs. Gibb & Co. rightly considered it proper to ascertain from the Registrar of Titles whether if their client was willing to fall in which the suggestion it could be done without imperilling his security. The result of the correspondence with the Registrar of Titles was that it could not, and as I understand the matter, the suggestion was not further considered by the Respondent or his Solicitors.

Mr. Woods has argued that it may be that the Respondent, without his knowledge, took this lien subject to any equities then existing. He argued that the agreement for the sub-division and, I suppose, partition between the two owners was completed and the request for sub-division to the Collector of Land Revenue made before the Respondent's lien was created. He has referred to the case *Re Fearon*, VI F.M.S. Law Reports 142, as supporting this contention. In that case Fearon was the registered proprietor together with two other persons of a piece of land. He executed a promissory note and deposited the title of the land in question. In fact, although three persons appeared on the Register as the owners, the interests of the other two had been acquired by Fearon, but he held 2/9 interest in the land in trust for two other persons. On Fearon's bankruptcy the Official Assignee admitted the lien-holder's claim to rank as secured creditor in regard to 3/9 interest but rejected his claim to rank for the remaining 4/9. The Court held that Fearon when he deposited the title gave to the lien-holder a lien over his 7/9 interest although registered in respect apparently of a 3/9 interest only. Mr. Woods argued that if in such a case as this the lien-holder is to get the benefit of the equities which were existing at the time when the lien was created he should be equally subject to the burden of any such equities. It does not appear from the report of *Fearon's* case whether the lien-holder knew the extent of Fearon's interest but I am satisfied that in this case at the time of the creation of the lien the Respondent had no knowledge of any intention to subdivide or partition the land, nor were there any circumstances to put him on enquiry; and to saddle him with equities of this description under the circumstances, would appear to me to defeat the whole object of the system of registration of title. Nor am I satisfied that the case *Re Fearon* was in fact decided on this ground. In the course of his judgment the Learned Judge in that case states that it was Fearon's intention when he handed the grant to the lien-holder to give him the whole of his interest in the property as security for the loan, and later he says:—"at the time Fearon signed the promissory note and deposited the grant it was his intention to give the lien-holder a lien over this 7/9 interest," and in my opinion the case was decided, as it was, on the ground that it was carrying out the intention of the person who created the lien, to decide it in that way.

It was also argued that when the Respondent received the letter of the 23rd of July, 1931, from the Collector which in effect informed him that the land was being subdivided, that put him upon enquiry, and that he should have inferred from this that it was intended to partition the land or, at the very least, enquired either from the Collector or S. L. S. the reason for sub-division. The Respondent has explained that when he received this letter he was under the impression that the sub-division was a Land Office matter and that it was not until the 6th of November, that he realised that S. L. S. and the Applicant were, as he says, behind the transaction. In any case it seems to me that there is nothing in the mere transaction of sub-division which should have led him to suppose that partition was intended. A sub-division might be required for the purpose of selling part of the land off, or of selling it in more convenient portions, or because a road was being constructed through the middle of the estate, or for one of many other reasons, and, although a person more conversant in transactions in land might have enquired the reason for sub-division, I do not think that the Respondent was under any obligation to do so.

I find therefore—

That the Respondent has not lost his lien over the land originally comprised in Grant

13272, or any part of it by virtue of the fact that he is no longer in physical possession of the title fer part of that land.

That he had at no time the intention of abandoning that lien or any part of it.

That he did not take the lien subject to any equities that might be existing at the time the lien was created.

That when it came to his knowledge that the land in question was being sub-divided, he was not put upon enquiry.

And that there is no evidence that anything has occurred to deprive the Respondent of his lien upon the half undivided share of S. L. S. Chettiappa Chettiar in the land formerly comprised in Grant 13272 and now comprised in Certificates of Title 10950 and 10951.

For these reasons the application is refused, and the Applicant must pay the Respondent's costs.

Application refused.

[APPELLATE CIVIL JURISDICTION]
GERATHY, J.
June 23, 1933.

K. SOCKALINGAM MUDALIAR ..... Appellant.

vs.

NADASAN SERANG.....Respondent.

[PERAK MAGISTRATE'S CIVIL APPEAL No. 17 of 1933]

Public Servants (Liabilities) Perak Order in Council, 1896, section 4—Effect of repeal—Public Servants Liabilities Enactment 1902, Repeal Enactment 1930, section 2—General Clauses Amendment Enactment, 1924, sections 3 (d) (ii) and (iv).

Under the provisions of sub-sections 3 (d) (ii) and (iv) of the General Clauses Amendment Enactment, 1924, not only is the immunity conferred upon public servants by section 3 of the Public Servants (Liabilities), Perak Order in Council, 1896, preserved but also the rights and privileges conferred upon them by section 4.

The fact that section 2 of the Public Servants Liabilities Enactments 1902, Repeal Enactment, 1930, specifically saves the immunity of public servants from the maintenance of actions against them cannot be taken to extinguish the rights and privileges of public servants in respect of that immunity conferred upon them by section 4 of the Public Servants (Liabilities), Perak Order in Council, 1896.

E. D. Shearn for the Appellant.

J. Dunford Wood for the Respondent.

Cur. Adv. Vult.

GERAHTY, J.—The facts giving rise to this appeal are as follows:—

On the 27th June, 1927, the plaintiff-appellant obtained a decree against the respondent (second defendant in the suit) on a claim for $489—being principal and interest due on a promissory note.

On the 9th August, 1932, the decree holder obtained an order for execution against the first defendant and the present respondent.

On the 26th November, 1932, the decree holder took out a judgment debtor summons against the respondent.

On the 14th March, 1933, the respondent made an application to set aside the decree passed against him. This application was supported by an affidavit averring that when he signed the promissory note in question he was a "Public Servant" within the meaning of the Public Servants (Liabilities) Regulation (Perak Order in Council 1896) and referring to section 4 of that Order in Council; further that at the time of the passing of the decree he was unaware of the law of the State.

The application was entertained by the Magistrate, Ipoh, and on the 8th April, 1933, an order was made setting aside the decree and declaring the same void under the Public Servants (Liabilities) Regulation.

The present appeal lies against that order on the ground that the Magistrate had no power to make an order setting aside and declaring void the decree against the defendant-respondent.

It is admitted that the defendant-respondent was in fact a "Public Servant" within the meaning of the Public Servants (Liabilities) Regulation, and that the decree in question was obtained in an "Action" within the meaning of the same Regulation. It is, however, contended by Mr. Shearn for the appellant that the Magistrate had no power to rescind the decree once it had been made and effected unless the case falls within either section 594 of the Civil Procedure Code or within section 4 of the Public Servants (Liabilities) Regulation and further that it is not a case within the purview of section 594 of the Civil Procedure Code and that the Magistrate had no power to investigate under section 4 of the Public Servants (Liabilities) Regulation, in as much as the provisions of that section have been repealed by the Public Servants Liabilities Enactments, 1902, Repeal Enactment 1930 (No. 17 of 1930). It is, in my opinion, quite clear that as a general rule a Judge or Magistrate has no power to rehear, review, alter or vary any judgment after it is entered or order after it is made up, except in cases which fall under what is known as "The Slip Rule." See the Yearly Practice of the Supreme Court 1933, Vol. I, p. 433 and the cases cited thereunder. It is equally clear, I consider, that this is not a case which is covered by the provisions of section 594 of the Civil Procedure Code.

The power, if any, then could only be exercised in this case by the Magistrate purporting to act under section 4 of the Public Servants (Liabilities) Regulation, and the short point of this appeal is to decide whether those powers have been preserved after the passing of Enactment No. 17 of 1930. Section 2 of that Enactment runs as follows:—

> "The Enactments specified in the schedule are hereby repealed but this repeal shall not render any action maintainable against a public servant in respect of any promise made or bond bill of exchange promissory note or other security made drawn accepted endorsed or given by him before the passing of this Enactment which would not have been maintainable had the said Enactments continued in force."